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331-204—69

QUESTION PRESENTED

Whether Sections 14b and 15 of the Shipping Act of 1916, as amended, 46 U.S.C. 813a, 814, apply to foreign-flag shipping lines which transport goods to American ports from points outside the United States.

STATUTE INVOLVED

P.L. 87–346, 75 Stat. 762, 46 U.S.C. 813a, 814, provides in part:

> An Act to amend the Shipping Act, 1916, as amended, to authorize ocean common carriers and conferences thereof serving the foreign commerce of the United States to enter into effective and fair dual rate contracts with shippers and consignees, and for other purposes.
>
> * * * the Shipping Act, 1916, is amended by adding after section 14a a new section to read as follows:
>
> "SEC. 14b. Notwithstanding any other provisions of this Act, on application the Federal Maritime Commission (hereinafter 'Commission'), shall, after notice, and hearing, by order, permit the use by any common carrier or conference of such carriers in foreign commerce of any contract, amendment, or modification thereof, which is available to all shippers and consignees on equal terms and conditions, which provides lower rates to a shipper or consignee who agrees to give all or any fixed portion of his patronage to such carrier or conference of carriers unless the Commission finds that the contract, amendment, or modification thereof

will be detrimental to the commerce of the United States or contrary to the public interest, or unjustly discriminatory or unfair as between shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, and provided the contract, amendment, or modification thereof, expressly (1) permits prompt release of the contract shipper from the contract with respect to any shipment or shipments for which the contracting carrier or conference of carriers cannot provide as much space as the contract shipper shall require on reasonable notice; (2) provides that whenever a tariff rate for the carriage of goods under the contract becomes effective, insofar as it is under the control of the carrier or conference of carriers, it shall not be increased before a reasonable period, but in no case less than ninety days; (3) covers only those goods of the contract shipper as to the shipment of which he has the legal right at the time of shipment to select the carrier: *Provided, however,* That it shall be deemed a breach of the contract if, before the time of shipment and with the intent to avoid his obligation under the contract, the contract shipper divests himself, or with the same intent permits himself to be divested, of the legal right to select the carrier and the shipment is carried by a carrier which is not a party to the contract; (4) does not require the contract shipper to divert shipment of goods from natural routings not served by the carrier or conference of carriers where direct carriage is available; (5) limits damages recoverable for breach by either party to actual damages to

be determined after breach in accordance with the principles of contract law: *Provided, however,* That the contract may specify that in the case of a breach by a contract shipper the damages may be an amount not exceeding the freight charges computed at the contract rate on the particular shipment, less the cost of handling; (6) permits the contract shipper to terminate at any time without penalty upon ninety days' notice; (7) provides for a spread between ordinary rates and rates charged contract shippers which the Commission finds to be reasonable in all the circumstances but which spread shall in no event be more than 15 per centum of the ordinary rates; (8) excludes cargo of the contract shippers which is loaded and carried in bulk without mark or count except liquid bulk cargoes, other than chemicals, in less than full shipload lots: *Provided, however,* That upon finding that economic factors so warrant, the Commission may exclude from the contract any commodity subject to the foregoing exception; and (9) contains such other provisions not inconsistent herewith as the Commission shall require or permit. * * * Any contract, amendment, or modification of any contract not permitted by the Commission shall be unlawful, and contracts, amendments, and modifications shall be lawful only when and as long as permitted by the Commission; before permission is granted or after permission is withdrawn it shall be unlawful to carry out in whole or in part, directly or indirectly, any such contract, amendment, or modification. * * *"

SEC. 2. Section 15, Shipping Act, 1916, is amended to read as follows:

"* * * * *

"Whoever violates any provision of this section or of section 14b shall be liable to a penalty of not more than $1,000 for each day such violation continues, to be recovered by the United States in a civil action."

SEC. 3. Notwithstanding the provisions of sections 14, 14b, and 15, Shipping Act, 1916, as amended by this Act, all existing agreements which are lawful under the Shipping Act, 1916, immediately prior to enactment of this Act, shall remain lawful unless disapproved, canceled, or modified by the Commission pursuant to the provisions of the Shipping Act, 1916, as amended by this Act: *Provided, however,* That all such existing agreements which are rendered unlawful by the provisions of such Act as hereby amended must be amended to comply with the provisions of such Act as hereby amended, and if such amendments are filed for approval within six months after the enactment of this Act, such agreements so amended shall be lawful for a further period of not to exceed one year after such filing. Within such year the Commission shall approve, disapprove, cancel or modify all such agreements and amendments in accordance with the provisions of this Act.

* * * * *

STATEMENT

The United States brought this action pursuant to Sections 14b and 15 of the Shipping Act of 1916, as amended, 46 U.S.C. 813a, 814, to recover penalties for violations of the Act by twelve shipping lines which

constituted the Continental-U.S.A. Gulf Westbound Freight Conference. This Conference was engaged in the carriage of cargo from Western Europe to United States Gulf of Mexico ports (Pet. App. 1–2). At all pertinent times the Conference employed a "dual-rate" contract system, under which shippers who agreed to tender to Conference carriers all of their cargo destined for the designated American ports paid a lower rate than other shippers (Pet. App. 3).

In response to this Court's decision that such contracts violated the Shipping Act (*Federal Maritime Board* v. *Isbrandtsen Co.*, 356 U. S. 481), Congress in 1961 in P.L. 87–346 amended the Act to authorize the Maritime Commission to permit the use of dual-rate contracts in American foreign commerce provided they contained the eight substantive provisions set out in the statute and any other provisions required by the Commission (see pp. 2–4, *supra*). The amendments provided that it "shall be unlawful to carry out in whole or in part, directly or indirectly, any such contract" without the permission of the Commission (46 U.S.C. 813a) and that violators may be penalized up to $1000 "for each day such violation continues, to be recovered by the United States in a civil action" (46 U.S.C. 814).

Section 3 of the amending Act (P.L. 87–346) provided that dual-rate contracts which had been amended to comply with the terms of the new law and which were filed with the Commission within six months after its enactment would be lawful, without Commission approval, for a period not to exceed one year after filing (see p. 5, *supra*). The six-month

period for filing of amendments to existing contracts expired on April 3, 1962. However, the Conference continued to employ unamended dual-rate contracts until August 15, 1962, when it was dissolved, thereby terminating the unlawful contracts (Pet. App. 5).

The government brought this action for penalties based on the use of unlawful dual-rate contracts from April 3, 1962 until August 15, 1962. After the claim against the three American-flag lines was compromised, the nine foreign-flag lines moved unsuccessfully to dismiss the complaint for lack of jurisdiction over the subject matter. On interlocutory appeal (28 U.S.C. 1292(b)) from the district court's denial of that motion, the court of appeals affirmed (Pet. App. A). The court rejected petitioners' contention that subjecting them to liability under the Shipping Act would involve problems of extraterritorial application of American law because performance under the dual-rate contracts was completed abroad by the shippers' "tender" of cargo for carriage to American Gulf ports (Pet. App. 5–9). Noting that foreign-flag lines comprise the vast majority of the carriers in American foreign commerce, and that representatives of these lines had unsuccessfully objected to their being covered by P.L. 87–346, the court held that Congress had intended to penalize all shipowners, including petitioners, who operated in American foreign commerce without complying with American laws (Pet. App. 10–12).

ARGUMENT

The Shipping Act permits the use of certain dual-rate contracts "by any common carrier or conference of such carriers in foreign commerce." To "carry out" a contract without Commission approval is unlawful and subjects the carrier to penalties (46 U.S.C. 813a). The definitional section, 46 U.S.C. 801, provides: "The term 'common carrier by water in foreign commerce' means a common carrier * * * engaged in the transportation by water of passengers or property between the United States * * * and a foreign country, whether in the import or export trade * * *." Petitioners do not contend that they do not come within the literal language of the statute. Their principal argument is that Congress did not intend to regulate dual-rate contracts between foreign-flag lines and foreign shippers.

1. Contrary to petitioners' contention, the legislative history establishes that Congress intended the Act to apply to foreign shipowners operating in American foreign commerce. The Congress was aware that foreign-flag carriers dominated the conferences which used dual-rate contracts. See, *e.g.*, 107 Cong. Rec. 19343, 21144 (remarks of Senator Kefauver), 19343–44 (table showing that 57 out of 62 conferences using dual-rate contracts had a majority of foreign-flag lines). For this reason, it was considered necessary that "[t]he bill would not be limited in its application to our own ships, but *would apply to foreign vessels as well,* which are more numerous even in the trades in and out of U.S. ports" (H. Rep. No. 498, 87th Cong., 1st Sess., p. 45, emphasis added).

The foreign shipowners were fully represented at the hearings on P.L. 37–346. While they strongly favored legislation permitting the use of dual-rate contracts (*e.g.*, S. Rep. No. 860, 87th Cong., 1st Sess., p. 11), they were opposed to being covered by the Act's regulatory and penalty provisions.[1] Notwithstanding these objections, Congress enacted the provisions without change, leaving no doubt that foreign-flag shipping lines were covered by the legislation.[2]

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[1] *E.g.*, S. Rep. No. 473, 87th Cong., 1st Sess., p. 5; 107 Cong. Rec. 19305 (remarks of Senator Engle); Hearings on H.R. 4299 Before the Special Subcommittee on Steamship Conferences of the House Committee on Merchant Marine and Fisheries (hereafter "House Hearings"), 87th Cong., 1st Sess., p. 233). Mr. Leonard G. James, one of the attorneys for petitioners here, testified extensively in the hearings as counsel for the Committee of European Shipowners, of which most of the petitioners were members. House Hearings, pp. 166–167. He made it quite clear that his clients felt that "[e]ach provision of this bill relates to the activities of all of the carriers in our trades wherever those activities take place." Hearings on H.R. 6775 before the Merchant Marine and Fisheries Subcommittee of the Senate Committee on Commerce (hereafter "Senate Hearings"), 87th Cong., 1st Sess., Part 1, p. 126.

[2] The legislative history set out in the petition (pp. 15–18) does show that Congress was attempting to aid American shippers. This does not detract from the fact that the Act covers both the import and export trade. See 46 U.S.C. 801.

Other portions of the legislative history support the government's view that Congress intended to cover carriers such as petitioners by this legislation. See Senate Hearings, Part 1, pp. 127, 128, 157; Senate Hearings, Part 2, pp. 235, 239–240, 243, 244, 250; House Hearings, pp. 168–169, 174, 183–196, 197, 199, 209, 234–237; S. Rep. No. 860, 87th Cong., 1st Sess., p. 30; 107 Cong. Rec. 19310.

2. Contrary to petitioners' assertion, there is no conflict in the treatment of the issue of extraterritorial application of American laws between the decisions below and *United States* v. *Aluminum Co. of America,* 148 F. 2d 416 (C.A. 2), in which the court held that Congress intended the antitrust laws to apply to conduct abroad which affected the commerce of the United States. In the instant case, the conduct which was the basis of the complaint and which is prohibited by the Act is the *employment* of unamended dual-rate contracts in *American* foreign commerce, *i.e.,* in commerce involving American ports. The court of appeals properly rejected petitioners' unpersuasive argument that the employment of their dual-rate contract system involved only conduct which was completed abroad by the tender of cargo to Conference carriers. That argument attempts to divorce the shipper's action in placing all his shipments with the Conference, which entitles him to the lower rates, from the main purpose of the agreement: to secure transportation of the goods to the United States. As the court of appeals pointed out (Pet. App. 8), the contracts themselves called for "transportation by [the carriers] to the United States through any port * * * in the Gulf of Mexico * * *." In view of the involvement of petitioners' contracts in American import trade, the decision below is fully consistent with the approach of the Second Circuit in *Alcoa.*

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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